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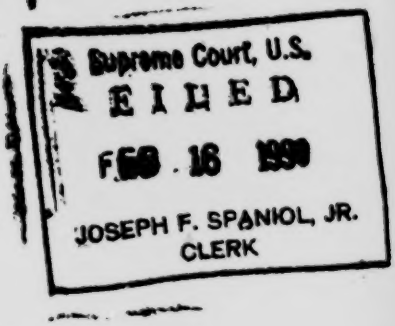

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

R.W. MEYER, INC., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTION PRESENTED FOR REVIEW

In this action arising under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. § 9601, et seq, is the Environmental Protection Agency entitled to recover, by the authority of the statute, its "indirect costs" necessary to operate the Superfund Program, which are not attributable to agency's efforts at any particular site?

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

R.W. MEYER, INC.[1] , Petitioner,
v.
UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, R.W. Meyer, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 20, 1989.

[1] R.W.Meyer, Inc. is not affiliated with any parent or subsidiary companies.

THE PARTIES TO THIS PROCEEDING

The parties to the proceeding in the District Court for the Western District of Michigan are:

United States of America,
Plaintiff

Northernaire Plating Company,
Defendant

Willard S. Garwood,
Defendant

R.W. Meyer, Inc.,
Defendant

The parties to the proceeding in the Sixth Circuit Court of Appeals are:

United States of America,
Plaintiff-Appellee

R.W. Meyer, Inc.,
Defendant-Appellant

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TABLE OF AUTHORITIES

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS BELOW

The official and unofficial reports of the decision of the United States District Court for the Western District of Michigan are United States of America v Northernaire Plating Co., Willard S. Garwood and R.W. Meyer, Inc., 685 F. Supp. 1410; 28 ERC 1500; 18 Envt'l L. Rep. 21,338.

The official and unofficial reports of the decision of the United States Court of Appeals for the Sixth Circuit are United States of America v R.W. Meyer, Inc., 889 F.2d 1497; 30 ERC 1553; 58 U.S.L.W. 2333.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The judgment sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit, which was decided and filed on November 20, 1989.

2. This petition for certiorari is filed within 90 days of November 20, 1989.

3. Jurisdiction to review the judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1).

4. No motion for rehearing was filed in the Court of Appeals, nor has there been any order granting an extension of time within which to the file the petition for writ of certiorari.

STATUTORY PROVISION INVOLVED

The statutory provision involved is the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. § 9601, et seq. The specific portions of the statute that are relevant to the issue presented are set forth at pages 6 through 9 of the opinion of the Sixth Circuit Court of Appeals included in the appendix to this petition.

STATEMENT OF THE CASE

1. The Nature Of This Case.

This action was brought by the United States under Section 107(a) of the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9601, et seq, (CERCLA). The United States seeks to recover its costs of an "immediate removal action." The purpose of the immediate removal action was to eliminate drums of hazardous wastes and to clean up some surface contamination from a site in Cadillac, Michigan. The immediate removal action was commenced by the Environmental Protection Agency on July 15, 1983, and was completed on August 3, 1983.

The action was brought against defendants Willard Garwood,

Northernaire Plating Company, and R.W. Meyer, Inc. seeking joint and several liability for the claimed removal costs. Northernaire had carried on an electroplating business at the site from 1971 to 1981. Northernaire had leased the site from its owner, Meyer. Willard Garwood was the president of Northernaire.

Plaintiff initially filed a motion for partial summary judgment on the question of liability. That motion was granted in April 1987, and the defendants were held to be jointly and severally liable for recoverable costs incurred in the removal action. Later, plaintiff filed a motion for summary judgment by which it sought to establish the nature and amount of those recoverable costs. The District

Court granted that motion, and it entered an order awarding $268,818.25, together with a finding that defendants would also be liable for "prejudgment interest." The parties subsequently filed a stipulation regarding the computation of the prejudgment interest, and the District Court entered an order pursuant to the stipulation for additional liability in the amount of $74,004.97.

This appeal is taken from the orders granting summary judgment to the plaintiff on the question of costs. Meyer contends that certain of those costs, particularly the government's "indirect costs" are not recoverable under CERCLA, as a matter of law, as they are not properly attributable to this removal action.

2. The Course Of The Proceedings.

Plaintiff's complaint was filed in the District Court on September 25, 1984. Meyer, Garwood, and Northernaire all defended, and various cross-claims and third-party claims were filed during the course of the proceedings. Meyer cross-claimed against Northernaire and Garwood, alleging their liability to Meyer, to the extent Meyer may be liable to the plaintiff. Northernaire and Garwood filed cross-claims against Meyer.

Each of the defendants also filed third-party complaints against the City of Cadillac, Michigan. The City of Cadillac filed a fourth-party complaint against Meyer.

All of these claims have been decided by the District Court on

motions for summary judgment. Final judgment was entered in favor of the plaintiff against the original defendants, resulting in this appeal. The City of Cadillac was dismissed, and that was not appealed.

4. Statement Of Facts Relevant To The Issues Presented For Review.

a. The applicable statutes and regulations.

Plaintiff's request for cost recovery is sought under the authority of § 9607 of CERCLA (42 U.S.C. § 9607). That section provides that a defendant may be liable for "all costs of removal." Removal is defined in § 9601(23) as follows:

> (23) "remove" or "removal" means the clean-up or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances

into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed materials, or the taking of such other actions as may be necessary to prevent, minimize or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974 [42 U.S.C.A. Section 5121, et seq.].

The activities authorized by § 9604(b) include:

...such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as [the President] may deem necessary or appropriate to plan and direct response actions, to recover the

costs thereof, and to enforce the provisions of this chapter.

The term "remedy" or "remedial action" is defined in § 9601(24) to mean:

> ...those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or to the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure

> that such actions protect the public health and welfare and the environment. The term includes the costs of relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare....

b. EPA's motion for summary judgment for the assessment of costs.

Plaintiff's motion for summary judgment on costs set forth several affidavits alleged to establish its costs incurred for the immediate removal action at the Northernaire site.

Plaintiff initially submitted four affidavits with its motion. The first of the affidavits was that of EPA

employee, Willimina Pipkin. She said that she was a Program Analyst in the Guidance and Oversight Branch of the Superfund Enforcement Division in the Office of Waste Programs Enforcement (OWPE). Ms. Pipkin's affidavit stated that she compiled and reviewed cost documentation for the immediate removal action at the Northernaire site. Thus, her affidavit purported to put forth a complete summary of costs for the Northernaire site.

The second affidavit was that of EPA accountant, Richard Hackley. He sought to verify, and attached to his affidavit, a computer report that he had prepared and supplied to Ms. Pipkin. Ms. Pipkin's and Mr. Hackley's affidavits both include a figure they attribute to the Northernaire site

referred to as "indirect cost." The amount reported is $53,397.00. Mr. Hackley states, with regard to these indirect costs, that they,

"...represent the costs necessary to operate the Superfund program but which cannot be attributed directly to specific cites."

Plaintiff also supplied the affidavit of William Cooke, a cost accountant with the Superfund Accounting Branch of the Financial Management Division of EPA. Mr. Cooke stated that he had been involved with the process of establishing EPA's indirect costs rates for the Superfund program. He explained, in general terms, what is meant by "indirect costs" and how they are calculated. He stated:

> The indirect costs of the Superfund program are those costs which are necessary to the operation of the program and support of site clean-up efforts, but which cannot be directly identified to the efforts of any one site. In lay terms, the indirect costs represent overhead costs, and include such things as rent and utilities for site and non-site staff office space; payroll and benefits for program managers, clerical support and other administrative support staff; and pay earned by on-scene coordinators while on leave, or performing tasks not directly associated with a particular site....

He also stated:

> The indirect cost allocation procedure requires a determination of the total administrative overhead costs for Agency for each fiscal year. Based on a model developed by the accounting firm of Ernst and Whinney, the overhead costs of Headquarters are allocated to each region. This Headquarters allocation is added to the regional overhead costs to get a regional indirect costs pool. The indirect cost rate for each region is then determined by dividing this total pool of indirect costs for each region by

the Superfund program hours incurred in each region.

***

Once the indirect cost rate for each region is determined for each fiscal year, the indirect costs can be allocated to specific Superfund sites. The indirect costs for a specific Superfund site are determined by applying the indirect cost rate for the region to hours charged to the site by regional program division personnel.

***

...The indirect cost rates for FY 1983 and FY 1984 are final rates that were reviewed and approved by the Office of Inspector General. The rates for fiscal years 1985 through 1987 are provisional rates only as the rates are under review by the Office of Inspector General. It is an acceptable accounting practice to apply the rate for the previous fiscal year, until such time as a final rate is determined.

Plaintiff's offerings also included an affidavit from Department of Justice employee, Philip Stiness.

Mr. Stiness sought to establish costs of the Department of Justice, relating to the Northernaire site, in the amount of $35,473.28.

Plaintiff also submitted two more affidavits subsequent to its filing of the motion, but before the District Court decided the motion. One of those was another affidavit of Richard Hackley. In this statement he changed some of the calculations he had included in his earlier affidavit. While he had previously claimed that indirect costs attributable to the Northernaire site totaled $53,397.00, he now stated that the indirect cost was $52,978.50. That change, he said, was due to the finalized rates that were established for fiscal years, 1985 and 1986. He also changed the figure

for costs attributable to Regional personnel, because he, "...discovered several minor corrections needed to be made in order to make the summary completely accurate." No further explanation of those corrections was given.

c. Defendant's response and submission of evidence in opposition to the motion.

Meyer opposed the motion, and submitted numerous attachments to its brief. These were documents obtained from plaintiff which Meyer argued were inconsistent with the statements set forth in plaintiff's affidavits supporting its motion.

Meyer took the position that there were numerous issues of fact precluding summary judgment on the question of costs. Meyer also took the

position that indirect costs, not directly attributable to the Northernaire site, and prejudgment interest, are not recoverable under CERCLA as a matter of law. Meyer also claimed that plaintiff's failure to abide by requirements for competitive bidding precluded its claim, and that plaintiff's claimed costs were inconsistent with the National Contingency Plan.

d. The decisions of the District Court and the Court of Appeals.

The District Court held in favor of Plaintiff, and granted summary judgment awarding the costs requested, with the exception of $993.00 expense of a title search. The court held that no material questions of fact existed that would preclude summary judgment,

and that indirect costs and prejudgment interest were recoverable under CERCLA and in this case.

The Sixth Circuit Court of Appeals affirmed the decision of the District Court. It held, as had the District Court, that plaintiff was entitled to recover indirect costs under the authority of CERCLA.

ARGUMENT

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Plaintiff has been awarded what it termed "EPA indirect costs." As defined by the affidavit of Richard Hackley, these are costs necessary to operate the Superfund program "...but which cannot be attributed directly to specific sites." As explained by the Cooke affidavit, these indirect costs, generally, are EPA overhead expenses, including, among other things, rent and payroll expense not related to the specific site. It is Meyer's position that recovery of these indirect costs is not authorized by CERCLA, either pursuant to the statutory language or by any caselaw interpreting that language.

The statute does provide, without question, for the recovery of any direct costs of removal, but the term "removal," as defined in 42 U.S.C. 9601(23), refers specifically to actions taken at a specific site. It does not refer to any costs indirectly incurred to operate the Superfund program in general.

The District Court and the Court of Appeals have held that proper interpretation of the statute permits the recovery of indirect costs. The starting point for statutory interpretation, however, should be the statute itself. Where, as here, the language is clear and unambiguous, and there is no clearly expressed legislative intention to the contrary,

there is neither need nor cause to look elsewhere.

In CERCLA, as amended by the Superfund Amendments & Reauthorization Act of 1986 (SARA), Congress provided lengthy and detailed definitions of the statutory terms it used. Those terms, as defined and used, are plain, unequivocal and unambiguous. The enactment speaks for itself, and the language must therefore be regarded as conclusive. See, National Freight, Inc. v Larson, 760 F.2d 499 (3rd Cir. 1985); Cia. Petrolera Caribe, Inc. v Arco Carribbean, Inc., 754 F.2d 404 (1st. Cir. 1985); United States v Lamp, 606 F.Supp. 193 (W.D. Tex. 1985); and Kansas Gas & Electric Co. v Brock, 780 F.2d 1505 (10th Cir. 1985).

unambiguously imposes liability for "all costs of [the] removal action incurred by the United States...not inconsistent with the national contingency plan." Section 9601(25) defines "respond" or "response" to mean a removal action, and "removal action" includes enforcement activities related to the removal action. Section 9601(23) then defines, in extended detail, the terms "remove" and "removal action." In that section, the terms expressly relate to cleanup and removal activities taken at the hazardous waste sites.

The definition of "removal action" includes actions taken under Section 9604(b), that is, action to investigate, monitor, survey or test a

site to identify the existence, extent and source of a release, and planning necessary to plan and direct a response to the release and recover the costs of that response action. This reference is not to ongoing EPA indirect costs of the Superfund program which are totally unrelated nor attributable to a given site removal action. See, 1980 U.S. Code Cong. & Admin. News, p. 3296 [House Conference Rpt. No. 99-962], where instead of a House amendment of Section 9607(a) to clarify that all costs incurred by the United States under Section 9604(b) are recoverable costs, the conference substitute deleted that reference to Section 9604(b) costs "since such costs are defined as costs of response in current law."

The statute, as amended, clearly says what it says and means nothing else -- The costs of a removal action and enforcement activities related to that action are recoverable. Indirect costs of operating the Superfund program generally, not related nor attributable to a given site removal action, fall outside the express language of the statute and are, therefore, not recoverable.

An exhaustive search of the legislative history of SARA, 1980 U.S. Code Cong. & Adm. News, p. 2838, supports this reading and conclusion. All relevant comments emphasize that the costs recoverable are the costs of site cleanups and the costs of enforcement activities related to those cleanups. There is nothing in the

voluminous legislative history to support the plaintiff's assertion that indirect costs of operating the Superfund program in general, unrelated to a given site removal action, are recoverable under CERCLA.

Plaintiff argued in the lower court that EPA's interpretation of the statute should be given great weight. That is not true here. As aptly stated in National Freight, Inc., supra, at 505:

> It is true that the interpretation of the agency charged with the implementation of a statute is generally accorded substantial deference....The question before this court, however, is a matter of pure statutory construction. In such a case, agency expertise is not controlling; the question is one which the courts are relatively more able to answer.... (citations omitted).

With the exception of the decision of the court below in this case, no case law interpreting CERCLA has authorized recovery of the indirect costs sought by the plaintiff. One District Court decision, as shall be discussed below, has expressly rejected the government's claim for indirect costs. Administrative costs related to a removal action are, indeed, recoverable. Those would include payroll costs and travel expenses of the EPA personnel directly involved with the Northernaire site removal action, and those of the Justice Department attorneys involved this cost recovery action.

Moreover, plaintiff would be correct to assert a claim to recover related administrative costs, as that

right is recognized in reported cases. No other reported case, however, has recognized an EPA right to recover "indirect" administrative or other costs of operating the Superfund program generally, which are unrelated to a given site removal action.

Plaintiff, in the court below, placed reliance on United States v Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823, 850-852 (W.D. Mo. 1984) (hereinafter cited as "NEPACCO"). There, the court found defendants liable for all costs incurred by plaintiff, including salaries and expenses, associated with activities such as monitoring, assessing and evaluating the release of contaminants and the taking of actions to minimize resulting damage at "at the

Denney Farm site." In so holding, the court was referring to nothing more nor less than direct, site specific response costs. In support, the court, in footnote 33, referred to United States v Slade, 447 F. Supp. 638 (E.D. Tex. 1978). There, in an action to recover costs of oil spill cleanup under the Federal Water Pollution Control Act, the court construed "actual costs incurred," as used in that statute, to include salaries and expenses of the agency's employee. The salaries and expenses recoverable amounted to $583.54, being "accumulated personnel and material costs" attributable to the two Coast Guard investigators who personally investigated the oil spill and obtained oil samples from the river and

defendants' barges to send to the EPA. Those were clearly direct, related administrative costs of responding to the oil spill. Thus, the NEPACCO decision does not lend support to the proposition that administrative costs, unrelated to a specific response action, are recoverable.

Plaintiff also relied, in the lower court, upon United States v South Carolina Recycling and Disposal, Inc., 653 F.Supp. 984 (D.S.C. 1985) (hereinafter referred to as "SCRDI"). That court also did not, however, authorize recovery of indirect costs. The administrative and other costs held recoverable by that court were those costs associated with the cleanup and the cost recovery litigation. The Court made no finding that

administrative costs, unrelated to the specific site removal action were recoverable.

In United States v Ottati & Goss, 694 F. Supp. 977 (D.N.H. 1988), the court specifically held that indirect costs claimed by the government were not recoverable under CERCLA. The court said, simply:

> $336,842.00 are indirect costs which include expenses for rent, utilities, supplies, clerical staff and other overhead expenses. These costs necessary to operate the Superfund program cannot be attributed directly to the O & G/GLGC sites, and are therefore disallowed." Ottati & Goss, supra, 995.

In NEPACCO, supra, 850, the court summarized the response costs the government may recover:

> With regard to the government's response costs incurred, these activities would include:

(a) Investigations, monitoring and testing to identify the extent of danger to the public health or welfare or the environment.

(b) Investigations, monitoring and testing to identify the extent of the release or threatened release of hazardous substances.

(c) Planning and implementation of a response action.

(d) Recovery of the costs associated with the above actions, and to enforce the provisions of CERCLA, including the costs incurred for the staffs of the EPA and the Department of Justice.

See also, United States v Conservation Chemical Company, 619 F. Supp. 162, 186 (W.D. Mo. 1985).

Plaintiff is attempting to recover all cost, including EPA overhead and all other imaginable costs, although it admits that they cannot be attributed directly to

specific sites or, more particularly, to this site. At the same time, Richard Hackley's acknowledges that regional CERCLA expenditures are maintained under a site-specific accounting system which allows the Agency to determine the specific Superfund site associated with each cost expenditure. In other words, EPA knows what costs can be directly attributed to the Northernaire site, yet it attempts to recover both those costs and an additional $53,000 of "indirect costs." Plaintiff is not authorized to recover, under CERCLA or any case law interpreting CERCLA, to recover the indirect costs that are claimed. The District Court and the Court of Appeals erred when they

misinterpreted the statute and awarded indirect costs.

This Court should grant the petition for the reason that the proper interpretation of this statutory provision is of great significance, not only to this defendant, but to numerous others similarly situated. The indirect costs assessed here represent a significant portion of the plaintiff's judgment. Given the fact that EPA is or will be pursuing similar costs at other Superfund sites, the total amounts of money at stake for the agency and the individual defendants is great, indeed. In short, there can be no doubt about the fact that this question is one of very great importance, and it merits the careful attention of this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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